



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 57 OF 2014

JAMES NDWIGA IRERI.....
CLAIMANT

-VERSUS-

BOARD OF MANAGEMENT ST. MARY'S MIXED DAY SECONDARY SCHOOL.....
RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 24th April, 2015)

JUDGMENT

The claimant filed the memorandum of claim on 14.05.2014 through Mungai Kivuti & Company Advocate. The claimant prayed for:

- a. A declaration that the act of terminating the contract of employment is illegal, unlawful and capricious.
- b. An order of reinstatement of the claimant to his original employment and or damages and compensation in lieu thereof.
- c. Punitive damages together with aggravated damages for loss of future earnings.
- d. Damages for lost opportunities in life.
- e. Any other relief that the court finds suitable to grant in the circumstances of this matter.

The respondent filed the memorandum of response on 18.06.2014 through A.M.Njagi, the learned State Counsel for the Attorney General of Kenya. The respondent prayed that the claim be dismissed with costs.

The respondent employed the claimant to the position of the school night guard with effect from 5.09.2004. The claimant served until 8.04.2014 when he left employment on account of the theft that occurred on that night. At termination, the claimant's monthly gross pay was Kshs. 7, 800.00.

On the night of 8.03.2014 the claimant testified that he was on duty and the school had held a fund raiser during the day. The tent that had been used at the fund raising function had not been removed from the school premises by the service provider. The claimant had been patrolling at the enclosure provided for the school pigs and goats and when he returned to the administration block at about 4.00AM he noticed that the door to the Principal's office had been broken into thus suggesting that a theft had taken place. The claimant testified that he telephoned the school's accounts clerk called Robert Muriuki at about 5.00AM to convey that a theft had taken place in the school. The claimant later telephoned the Principal. The Principal together with the respondent's chairperson and treasurer arrived at the school, a report was made at Manyatta Police Station and the claimant was arrested. The claimant was released on bond on 10.03.2014 and he resumed work on 11.03.2014 till 8.04.2014.

On 8.04.2014 the claimant testified that the respondent's Principal, chairperson and treasurer summoned the claimant and asked the claimant to write a resignation letter in view of the said theft so that the criminal complaint would be withdrawn. In subsequent events, the police did not prefer any criminal charges against the claimant

During the cross examination, the claimant stated that he observed the theft at 5.00AM, he had gone to the livestock enclosure at 3.30AM and stayed there for about 30 minutes.

The **1st issue** for determination is whether the termination was unfair. The evidence shows that the claimant was not given the notice of termination as provided for in section 41 of the Employment Act, 2007. However, the respondent's executive committee met on 8.04.2014 and the accusations were read to the claimant. The allegations as recorded in the relevant minutes were as follows:

- a. Five computers were stolen plus other items from the school on the night of 8.03.2014.
- b. The claimant reported the theft very late, i.e. 5.30AM and he called the Principal at 5.27AM on 09.03.2014.
- c. The statements given to the accounts clerk and the respondent's chairperson by the claimant had been uncoordinated and expressed the desire not to continue with employment.

The minutes further recorded that the respondent's chairperson then gave the claimant options namely, the court case to continue as suggested by the sergeant; the claimant to write a resignation letter; or the claimant to be summarily dismissed for gross negligence of duty.

At the committee meeting of 23.04.2014, it is recorded that the claimant had informed the meeting that he had opted not to write the resignation letter but to continue with the court case. The meeting then resolved that the respondent's secretary would inform the police accordingly. The evidence shows that the claimant was subsequently not given a termination letter. Further the extract from the police occurrence book OB 25/9/3/2014 shows that the claimant was held by the police with respect to alleged offence of failing to prevent a felony pending further investigations and then released by the police without any complain and to report back on 12.03.2014. The claimant's evidence was that the Kshs. 10,000.00 for police bond was refunded to him with information that he was not culpable.

The court has carefully considered the events leading to the cessation of the claimant's employment. First, it is clear that the administrative disciplinary procedure never commenced in the claimant's case. In the opinion of the court the respondent engaged in deliberations characterized with making of proposals for the claimant to act one way or the other; indicating a negotiation and not exercise of disciplinary powers or authority by the employer. In the opinion of the court, the respondent's action of giving the claimant options in view of the allegations that had been leveled against the claimant fell short of the respondent's authority to undertake decisive disciplinary proceedings and leading to a conclusive decision in the case. Secondly, it is clear that the respondent opted not to initiate and continue administrative disciplinary process against the claimant but to rely on the outcome of the police investigations which, taking all material on record into account, leads to irresistible inference that the claimant was found not culpable because no criminal proceedings followed. Thirdly, it is clear that the respondent did not make a decision to terminate the claimant's employment and in absence of assignment of duty and requests for resignation but which the claimant was opposed to, the court finds that the claimant was entitled to consider himself terminated; the court finds that the claimant was constructively terminated from employment by reason of the respondent's failure to take out and conclude administrative disciplinary proceedings and by reason of the respondent's abrupt failure to assign the claimant work to perform.

The court finds that the termination was constructive and unfair. In particular the court finds that the respondent invented an alien procedure (that was not provided for in the contract of employment and the Employment Act, 2007) that entailed a negotiated separation which incidentally did not yield a separation agreement and did not amount to a legitimate disciplinary procedure entailing a notice and a hearing as envisaged in section 41 of the Employment Act, 2007. The court finds that the respondent has not only failed to establish the reason for termination as required in section 47(5) of the Act, but also never overtly exercised the power to terminate. The court holds that such blurred conduct on the part of the respondent

served to show that the ensuing constructive termination was unfair.

To answer the 1st issue for determination, the court finds that the claimant was constructively terminated from employment and that termination was unfair for want of due process and genuine reasons.

The 2nd issue for determination is whether the claimant is entitled to the remedies as prayed for. The court makes findings as follows:

- a. The claimant prayed for reinstatement and in alternative compensation for the unfair termination. The court has considered the role of a night guard in the respondent school and the convenience to the parties to implement an order for reinstatement. The court considers that in absence of strong grounds made for the claimant urging for reinstatement, the order for reinstatement will be declined in the instant case. While making the finding that reinstatement will not serve ends of justice, the court has taken into account the respondent's apparent surrender or unwillingness to impose its authority and to exercise human resource powers over the claimant as shown in the manner the respondent handled the disciplinary case in issue.
- b. The claimant has prayed for compensation including damages for unfair termination, punitive damages and aggravated damages for loss of future earnings. The court has found that the termination was unfair. The material on record has established a bumpy record of service with several explanations and apologies on the part of the claimant. The court has considered the inconsistent account by the claimant about the delay in reporting the theft in issue. The court finds that the claimant contributed to circumstances leading to his termination and 6 months' salaries for unfair termination making **Kshs. 46, 800.00** at Kshs. 7, 800.00 per month will meet the ends of justice.
- c. As for lost future earnings, the court finds that the claimant is entitled to partial payment at least until his fate on the termination dispute is resolved. The court upholds its opinion in **Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers –Versus- Timber Treatment International Limited,[2013]eKLR, Industrial Cause No. 21 of 2012 at Nakuru, page 10-11**, where the court stated thus **“In making the findings the court considers that the employee is entitled to pay for the period he or she is kept away from work due to unlawful and unfair suspension or termination. In such cases, the employee is entitled to at least partial reinstatement, and therefore compensation whose measure is the proportionate unpaid or withheld salary throughout that period of unlawful or unfair suspension or termination. During such period, the court considers that the employee carries a valid legitimate expectation to return to work and not to work elsewhere until the disciplinary or the ensuing conciliatory and legal proceedings are concluded. In arriving at the finding of entitlement to reinstatement during unlawful or unfair suspension and termination, the court has taken into account the provisions of subsection 49(4) (f) which states that in arriving at the proper remedy, there shall be consideration of, ‘(f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for termination;’.** The court is of the opinion that for the period the question of unfairness or fairness of the suspension or termination has not been determined, the employee carries a reasonable expectation that for the period pending the determination of that question, the employment has not validly terminated and the employee is entitled to reinstatement during that period provided the employee is exculpated; with pendency of such serious question, the employee is validly expected to pursue the resolution with loyalty not to work for another employer. It is the further opinion of the court that where the court finds that the suspension or termination was unlawful or unfair, the employee is entitled to at least partial reinstatement, and therefore, a total of the salaries due during that period. The exception (to such entitlement to partial reinstatement for the period pending a final decision on the dispute) is where it is established that during that period, the employee took on other gainful employment or the employee fails to exculpate oneself as charged.” Accordingly, the court finds that the claimant is entitled to pay from April 2014 to the date of this judgment making at least 12 complete months and the claimant is awarded **Kshs. 93, 600.00** at Kshs. 7,800.00 per month. The claimant having concluded the dispute by reason of this judgment, his future is now defined and in the court's opinion, there is no reason

why he should not seek alternative gainful engagement.

In conclusion, judgment is entered for the claimant against the respondent for:

1. The respondent to pay the claimant **Kshs.140, 400.00** by 01.06.2015 failing interest at court rates to be payable thereon from the date of this judgment till full payment.
2. The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Friday, 24th April, 2015.**

BYRAM ONGAYA

JUDGE